

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

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RONALD D. DIGGS,

Plaintiff,

vs.

LAS VEGAS METROPOLITAN POLICE  
DEPARTMENT, a political subdivision of the  
State of Nevada; SGT. D. WALBURN,  
individually; OFFICER T. ROBERTS,  
individually, and JOHN DOES I-X, inclusive,

Defendants.

Case No.: 2:09-cv-02339-RLH-RJJ

**O R D E R**

(Motion to Dismiss—#62)

Before the Court is Defendants Las Vegas Metropolitan Police Department, Sgt. D. Walburn, and Officer T. Roberts’ (collectively, “Defendants”) **Motion to Dismiss** (#62, filed Oct. 9, 2013) for failure to state a claim. The Court has also considered Plaintiff’s Opposition (#65, filed Nov. 4, 2013), and Defendants’ Reply (#66, filed Nov. 12, 2013). For the reasons discussed below, the Court denies Defendants’ Motion.

**BACKGROUND**

This is a § 1983 case alleging excessive force during an arrest. The Complaint sets forth the following allegations:



1 assumption of truth. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Mere recitals of the elements of  
 2 a cause of action, supported only by conclusory statements, do not suffice. *Id.* at 678.

3 While Rule 8 does not require detailed factual allegations, it demands “more than  
 4 labels and conclusions” and “[f]actual allegations must be enough to rise above the speculative  
 5 level.” *Twombly*, 550 U.S. at 555. To survive a motion to dismiss, a complaint must contain  
 6 sufficient factual matter to “state a claim to relief that is plausible on its face.” *Id.* at 570. When  
 7 the claims in a complaint have not crossed the line from conceivable to plausible, the plaintiff’s  
 8 complaint must be dismissed. *Id.*

### 9 **B. Analysis**

#### 10 *1. State Law Claims*

11 Defendants argue that the state law claims included in the Amended Complaint are  
 12 barred by the statute of limitations. The applicable statute of limitations for Plaintiff’s state law  
 13 claims is two years. NRS 11.190(4). Plaintiff’s original complaint was filed within that period,  
 14 but it did not include these state law claims. Defendants argue that because these legal theories  
 15 were omitted from the original complaint, they cannot relate back to the date of original filing.  
 16 Accordingly, Defendants assert that the claims are barred and no longer actionable.

17 Whether an additional claim included in an amended complaint relates back to the  
 18 date of the original filing is governed by Fed. R. Civ. P. 15(c). Under Rule 15(c), the amendment  
 19 relates back when it “asserts a claim . . . that arose out of the conduct, transaction, or occurrence  
 20 set out—or attempted to be set out—in the original pleading.” “Claims arise out of the same  
 21 conduct, transaction, or occurrence if they ‘share a common core of operative facts,’ such that the  
 22 plaintiff will rely on the same evidence to prove each claim.” *Williams v. Boeing Co.*, 517 F.3d  
 23 1120, 1133 (9th Cir. 2008) (citing *Martell v. Trilogy Ltd.*, 872 F.2d 322, 325-26 (9th Cir. 1989);  
 24 *Percy v. S.F. Gen. Hosp.*, 841 F.2d 975, 978 (9th Cir. 1988)). Thus, relation back is allowed when  
 25 the original pleading adequately put the defendant on notice of the facts which ultimately underlie  
 26 the new claim. *See Percy*, 841 F.2d at 979.

1 Plaintiff's state law claims relate back to the original filing because they are based  
2 on the same facts as those pled in the original complaint. Plaintiff's claims for intentional and  
3 negligent infliction of emotional distress, battery, assault, and negligence are all rooted in the  
4 allegations of Officer Robert's use of excessive force in effectuating Plaintiff's arrest. These  
5 factual allegations appear in the underlying complaint and also form the basis for Plaintiff's  
6 Constitutional claims. Thus, the claims share a common core of operative facts and the same  
7 evidence would tend to prove both sets of claims. Because the original pleading adequately put  
8 Defendants on notice of the facts that underlie Plaintiff's state law claims, the amendment relates  
9 back to the date of the original filing, and the claims are not barred by the statute of limitations.

## 10 2. *Constitutional Claims*

11 Defendants also contend that Plaintiff's first cause of action in the Amended  
12 Complaint improperly relies on the Fourteenth Amendment. Defendants argue that the proper  
13 mechanism for pleading an excessive force claim is under the Fourth Amendment. The Court  
14 agrees. "Where a claim can be analyzed under 'an explicit textual source' of rights in the  
15 Constitution, a court may not also assess the claim under another, 'more generalized,' source."  
16 *Ramirez v. Butte-Silver Bow County*, 298 F.3d 1022, 1029 (9th Cir. 2002) (quoting *Graham v.*  
17 *Connor*, 490 U.S. 386, 394-95 (1989)). Here, the Fourth Amendment provides an explicit textual  
18 source of constitutional protection for use of excessive force and unlawful arrest, while the Due  
19 Process clause of the Fourteenth Amendment provides more generalized protection. Nonetheless,  
20 as Plaintiff's first cause of action also contains allegations relating to the Fourth Amendment, the  
21 claim need not be dismissed. The parties are informed, however, that Plaintiff's first cause of  
22 action will be analyzed under the Fourth, not the Fourteenth, Amendment.

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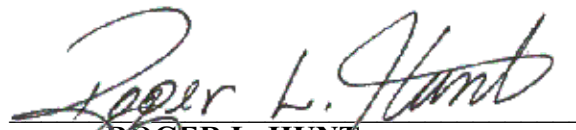
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**CONCLUSION**

Accordingly, and for good cause appearing,

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss (#62) is DENIED.

Dated: November 20, 2013.

  
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**ROGER L. HUNT**  
United States District Judge